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No. 00-973

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ALPHONSO VONN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

The Ninth Circuit has consistently adopted an approach to appellate review of errors in the guilty-plea colloquy required by Rule 11 of the Federal Rules of Criminal Procedure that is far more restrictive than the approach of most other circuits. Respondent argues that this Court should decline to resolve that circuit conflict because, in his view, the government did not properly preserve its positions below, the conflict is more apparent than real, and this case does not present a suitable vehicle for addressing those claims. Each of those contentions is incorrect.

1. *Standard of Review (Harmless Error or Plain Error).*

a. Respondent first contends (Br. in Opp. 1-2, 6, 9-11) that, because the government did not expressly argue to the court of appeals in this case that it should apply a plain-error, rather than harmless-error, standard, that issue is not preserved for this Court's review. That contention is incorrect.

This Court's "traditional rule" permits review of a claim when it was "pressed" *or* "passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992). The rule thus allows review "of an issue not pressed so long as it has been passed upon" by the court whose judgment is under review. *Ibid.*; see *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (rejecting claim that issue was not preserved when it was not raised below; "[i]t suffices for our purposes that the court below passed on the issue presented"); *Stevens* v. *Department of the Treasury*, 500 U.S. 1, 8 (1991). In this case, the court of appeals, citing its recent decision in *United States* v. *Odedo*, 154 F.3d 937, 940 (9th Cir. 1998), expressly decided that it would apply a harmless-error standard of review. See Pet. App. 5a. Because the

court of appeals thus passed on the standard of appellate review, that issue is properly presented for this Court's consideration.

Although in this case the government did not challenge *Odedo* as the controlling precedent in the court of appeals, that does not preclude the government from raising the standard-of-review issue in this Court. In *United States* v. *Williams*, this Court held that an issue is properly preserved for review on certiorari when, "although the petitioner did not contest the issue in the case immediately at hand, it did so as a party to the recent proceeding upon which the lower courts relied for their resolution of the issue, and did not concede in the current case the correctness of that precedent." 504 U.S. at 44-45. This case satisfies that requirement.[1] The government was not also obligated to "demand overruling of a squarely applicable, recent circuit precedent, even though that precedent was established in a case to which the [government] itself was privy and over the [government's] vigorous objection." *Id.* at 44. Such an additional requirement would be, as the Court stated in *Williams*, "unreasonable." *Ibid.*

Respondent also contends (Br. in Opp. 10-11) that the government did not argue below that the proper harmless-error inquiry for a Rule 11 violation is whether the district court's failure to comply with Rule 11 affected his decision to plead guilty. See Pet. 16-17. The court of appeals, however, clearly adopted the different rule that the inquiry into prejudice turns on "an affirmative showing on the record that

[1] In *Odedo*, as the court of appeals there noted, the government argued that, "because Odedo failed to raise his Rule 11 contention in the district court * * * it is 'waived,'" and the court interpreted that contention to mean that "it is the Government's contention that we must invoke a 'plain error' analysis for a 'forfeited error.'" *Odedo*, 154 F.3d at 939. The court of appeals then explicitly rejected that contention and concluded that departure from Rule 11 requires reversal unless the government demonstrates that the error was "harmless." *Id.* at 940.

defendant was aware of his rights." Pet. App. 9a (internal quotation marks omitted). Again, that position was consistent with the legal standard that the court had adopted in *Odedo*. 154 F.3d at 940. Thus, the court "passed upon" (*Williams*, 504 U.S. at 41) the showing that must be made to establish an effect on "substantial rights" from a Rule 11 error—an issue that is the subject of a circuit conflict. See Pet. 16. And if the correct standard of review in a case like this is the *plain* error standard, as we contend, a logical subsidiary issue is whether, in deciding whether a Rule 11 error affected the "fairness, integrity or public reputation of judicial proceedings," *United States* v. *Olano*, 507 U.S. 725, 732 (1993), a court should affirm when the defendant would have pleaded guilty even absent the Rule 11 violation. Because the plain-error question is properly before this Court, so is the subsidiary issue of its proper application.

b. There is no merit to respondent's contention (Br. in Opp. 11-19) that the difference between harmless-error and plain-error review in this context is of little significance. There are two significant differences. The first relates to the party that bears the burden of proof. The most frequent setting in which a Rule 11 violation will not affect substantial rights is when the defendant is aware of the omitted advice from another source. If the harmless-error standard applies, then the government bears the burden of proof in making that showing. See *Olano*, 507 U.S. at 734. The government will be at a significant disadvantage, compared to the defendant, in doing so, because the defendant best knows what advice he has received. Indeed, the showing required of the government will be particularly difficult, if not impossible, if the court of appeals restricts the scope of its review to the transcript of the plea proceeding, as the court did in this case (see Pet. App. 6a-7a). In contrast, if a plain-error standard applies, then the defendant bears the burden of proof to show an effect on his substantial rights—*i.e.*, that the error

"affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 734.

The second important distinction between harmless-error and plain-error review is that plain-error review requires not only an effect on substantial rights, but also a basis for the court of appeals to exercise its discretion to correct the error. See *Olano*, 507 U.S. at 732 (court of appeals should exercise discretion to reverse for plain error only if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings") (punctuation altered). Even if a Rule 11 error were found to affect substantial rights, reversal would not be warranted under the discretionary aspect of plain-error review when the defendant acted knowingly and voluntarily and would have entered a guilty plea even had he been provided with the omitted information. See *United States* v. *Hoyle*, 2001 WL 8577, at *4 (1st Cir. Jan. 8, 2001). Contrary to respondent's contention (Br. in Opp. 11), there may well be cases in which the defendant cannot make a persuasive showing on that point—for example, where the guilty plea was unquestionably voluntary, and where the defendant was offered a highly favorable plea agreement or the case against the defendant was strong. When the district court omits a small part of the information required by Rule 11 in its colloquy, the defendant fails to object to that omission, and the factual basis for the guilty plea is compelling, there is little to commend vacatur of the plea.

Although respondent acknowledges that the courts of appeals have divided over the standard of review to be applied to claims of Rule 11 error not raised at trial, he contends (Br. in Opp. 14-18) that there has been little practical difference between the approaches followed by the "plain-error" and the "harmless-error" courts. That is incorrect. As respondent notes (*id.* at 16), all the courts of appeals do undertake a fact-specific review of particular records to determine whether the guilty plea should be vacated; but the

critical question is what the courts are looking for in making that record review, and on that point they have diverged significantly. The "plain-error" courts have generally asked whether the record shows some fundamental defect in the guilty plea, such as whether the plea was not knowingly and voluntarily made.[2] By contrast, the Ninth Circuit, applying a harmless-error standard, has found reversible error even where there is no reason to doubt that the defendant acted voluntarily and intelligently in making the guilty plea.[3] Indeed, it reversed in this case, even though the district court found, based on a colloquy with the defendant, that the plea was voluntary and intelligent and had a factual basis, see Resp. C.A. Ex. Rec. 26, 32, because the district court

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[2] See, *e.g.*, *United States* v. *Cross*, 57 F.3d 588, 591 (7th Cir.) ("Therefore, our review of Cross' plea is based on whether under the totality of the circumstances, the plea was voluntary and intelligent."), cert. denied, 516 U.S. 955 (1995); *United States* v. *Bashara*, 27 F.3d 1174, 1180 (6th Cir. 1994) (declining to vacate plea because "it cannot be said * * * that Bashara was 'affirmatively misled'" about his potential sentence), cert. denied, 513 U.S. 1115 (1995); see also *United States* v. *Quinones*, 97 F.3d 473, 475 (11th Cir. 1996) (plain-error review involves whether the district court "failed to address a core concern of Rule 11[:] * * * (1) ensuring that the guilty plea is free of coercion; (2) ensuring that the defendant understands the nature of the charges against him; and (3) ensuring that the defendant is aware of the direct consequences of the guilty plea").

[3] See *United States* v. *Kennell*, 15 F.3d 134, 135-137 (9th Cir. 1994) (vacating guilty plea under harmless-error standard where district court failed to advise defendant, as required by Rule 11(e)(2), that defendant could not withdraw his guilty plea if the court rejected government's sentencing recommendation, even though defendant had signed plea agreement advising him of that point, and even though district court made certain that the plea was voluntarily and intelligently made); *United States* v. *Graibe*, 946 F.2d 1428, 1432 (9th Cir. 1991) (also vacating guilty plea under harmless-error standard where district court failed to advise defendant that defendant could not withdraw his guilty plea if the court rejected government's sentencing recommendation, even absent showing that defendant was misled on that point).

failed to provide the defendant with a part of the advice required by Rule 11(c)(3).

c. Respondent suggests (Br. in Opp. 18 n.4) that this case is not a suitable vehicle for resolution of the proper standard of review because the prosecutor brought to the court's attention the possibility that the court had not fully complied with Rule 11(c)(3). Respondent contends that this was sufficient to alert the court to a mistake that should have been corrected and to avoid the application of the plain-error rule in the court of appeals. The court of appeals, however, concluded that the prosecutor's statement was "elliptical at best" because it referred only to respondent's right to *counsel*, not his right to *counsel at trial*, which is not the same thing.[4] See Pet. App. 7a.

Moreover, we are not aware of any authority for the proposition that such a statement by a *prosecutor* is sufficient to carry the *defendant's* burden to preserve a claim of error in the district court if the defendant makes no comment whatever. "Generally, the need to object, and thus to preserve an error for appeal is personal." Lissa Griffin, *Federal Criminal Appeals* § 4.2(5)(b) at 4-18 (2000). Indeed, as a general matter, a defendant may not raise on appeal a claim of error that only a co-defendant has preserved in the trial court.[5]

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[4] Compare Fed. R. Crim. P. 11(c)(2) (court must advise unrepresented defendant that he has "the right to be represented by an attorney at every stage of the proceeding") with Fed. R. Crim. P. 11(c)(3) (court must advise represented defendant that he has "the right to be tried by a jury and at that trial the right to the assistance of counsel").

[5] See *United States* v. *Warfield*, 97 F.3d 1014, 1024 (8th Cir. 1996) (failure to join co-defendant's objection to restriction of cross-examination), cert. denied, 520 U.S. 1110 (1997); *United States* v. *Hernandez*, 896 F.2d 513, 523 (11th Cir.) (failure to join co-defendants' motions for mistrial), cert. denied, 498 U.S. 858 (1990); *United States* v. *Palow*, 777 F.2d 52, 54 (1st Cir. 1985) (failure to join co-defendants' motions for severance), cert. denied, 475 U.S. 1052 (1986). Courts have

Especially in the context of a guilty-plea proceeding, a rule permitting a defendant to "vicariously object" based on a prosecutor's suggestion that the court had not complied with Rule 11 would be undesirable, for several reasons. First, the requirement that a defendant preserve a claim of error in the lower court promotes the adversary system, because it limits appeals to issues about which the defendant truly cares. If, by contrast, the defendant remains silent but then is permitted to raise the failure to comply with Rule 11 on appeal for the first time, the defendant will receive a windfall based on the diligence of another party to the case. Second, the strong societal interest in the finality of guilty pleas favors a rule that the defendant make some effort to challenge the validity of his plea in the lower court, so that a defendant is not induced to appeal merely because he is unhappy with the sentence that the district court imposes after accepting his guilty plea. Third, a defendant who pleads guilty will often have the opportunity to move to withdraw his guilty plea after the plea is accepted but before sentence is imposed, and thereby to bring the error again to the district court's attention as a possible basis for allowing him to replead. See Fed. R. Crim. P. 32(e) (authorizing district court to permit a guilty plea to be withdrawn before sentencing "if the defendant shows any fair and just reason"). If a defendant moves to withdraw his plea, then the district court can either permit him to replead or, if it declines to do so, can develop a record on the issue of prejudice for review by the court of appeals. In a case like this one, for example, a

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recognized an exception to that rule when the trial court expressly adopted a practice that an objection by one defendant applied to all defendants, see Griffin, *supra*, at 4-18 to 4-19, and some courts have also adopted a more lenient rule allowing defendants to press on appeal objections to evidence that were made at trial only by their co-defendants, see *id.* at 4-19. "However, with other types of error, where there is no evidence that the court applied the 'one-objection' practice, vicarious preservation will not be permitted." *Ibid.*

district court might conclude that it would not be "fair and just" to permit the defendant to withdraw his plea because the defendant had been informed, before pleading guilty, of all his constitutional rights attendant to a trial, or because the defendant would have entered a guilty plea even if the district court had fully complied with Rule 11.

2. *Scope of Record on Review.*

Although respondent acknowledges (Br. in Opp. 19) that the court of appeals ruled in this case that it would consider only the record of the plea proceeding to determine whether the district court's failure to comply with Rule 11 was harmless, he contends (*id.* at 20) that the Ninth Circuit has not followed such a flat rule in other cases, and (*id.* at 20-23) that the decision below does not, in any event, conflict with decisions of other circuits. Both contentions are incorrect.

The other Ninth Circuit decisions cited by respondent do not suggest that the court of appeals will consider matters outside the plea proceeding in determining whether a Rule 11 error affected the defendant's substantial rights. In three of those decisions, the Ninth Circuit held only that the district court's failure to give the defendant specific required advice at the plea proceeding was harmless in light of other advice that the court had given the defendant *at the same proceeding*.[6] In another case, the court merely reaffirmed

[6] In *United States* v. *Crawford*, 169 F.3d 590, 592 (9th Cir. 1999), the court failed to advise the defendant that he would be subject to mandatory restitution following his guilty plea, but the error was deemed harmless because the court did advise the defendant that he was subject to a fine well in excess of the amount of the restitution that was actually imposed. In *United States* v. *Sanclemente-Bejarano*, 861 F.2d 206, 210 (9th Cir. 1988), the court failed to advise the defendant that he would be subject to a term of supervised release following release from incarceration, but the error was deemed harmless because the court advised the defendant that he was potentially subject to a maximum life prison term. In *United States* v. *Rivera-Ramirez*, 715 F.2d 453, 458 (9th Cir. 1983), cert. denied, 467 U.S. 1215 (1984), the court failed to advise the defendant of the minimum special parole term he might be required to serve following his incarceration, but the error was deemed harmless because the court advised the defendant at the hearing that he might be subject to a life special parole term, which could convert to a life prison term if the parole terms were violated.

that it would not reverse a conviction based on a technical deviation from the requirements of Rule 11 where the defendant had clearly suffered no prejudice.[7] And the Ninth Circuit has also made clear in other Rule 11 contexts, beyond the failure to give all the advice required by Rule 11(c)(3), that it will not look beyond the record of the plea proceeding in making its harmless-error review. See *United States* v. *Kennell*, 15 F.3d 134, 137 (9th Cir. 1994) (district court's failure to advise defendant, as required by Rule 11(e)(2), that it was not bound by sentence recommendation in plea agreement, held not harmless, even though signed plea agreement itself informed defendant that court was not so bound); *Odedo*, 154 F.3d at 940 (court failed to inform defendant of nature of the charges against him, as required by Rule 11(c)(1); court of appeals limited its review "to the record of the plea proceeding at issue").

By contrast, the en banc Fifth Circuit, in *United States* v. *Johnson*, 1 F.3d 296 (1993), expressly rejected a rule limiting harmless-error review to "the plea hearing transcript," *id.* at 298 n.6, and held that it could review even matters in the record *after* the plea hearing, such as the transcript of sentencing, see *id.* at 302. The D.C. Circuit considered the transcript of the sentencing hearing in *United States* v. *Lyons*, 53 F.3d 1321, 1323 (1995), in ruling that the Rule 11 error in that case was harmless. While both courts recognized that the task before them was to determine whether the infor-

[7] See *United States* v. *Chan*, 97 F.3d 1582, 1584 (9th Cir. 1996) (although district court failed to advise defendant that it was not bound by terms of plea agreement and could impose a sentence higher than that recommended in the agreement, that error was harmless since court imposed the very sentence bargained for in the plea agreement).

mation omitted from the district court's advice to the defendant could have influenced his decision to plead guilty at the time he did so (see *Johnson*, 1 F.3d at 303; *Lyons*, 53 F.3d at 1323), the important point is that both courts did not confine themselves to the plea proceeding, even broadly defined, in performing that task. Those decisions therefore conflict with the Ninth Circuit's restriction of harmless-error review to the record of the guilty plea proceeding.

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For the foregoing reasons, and for those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2001